STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving

November 1958

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the Penal Code and the Vehicle Code should be revised to eliminate certain overlapping provisions relating to the unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. I. Robert Harris.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Overlapping Provisions of the Penal and Vehicle Codes Relating to Unlawful Taking of Vehicles and Driving While Intoxicated

Both the Penal Code and the Vehicle Code contain provisions relating to the unlawful taking of vehicles and to driving a vehicle while intoxicated. The Commission has found that the provisions in each code largely duplicate those in the other and that this overlapping of statutory provisions has created a number of both theoretical and practical problems for the courts. (See the Commission's research study *infra*.) The Commission recommends, therefore, that the existing duplication be eliminated by the following legislative action:

Unlawful Taking of Vehicle

Delete from subsection (3) of Section 487 of the Penal Code the provision which defines the permanent taking of an automobile as grand theft, repeal Section 503 of the Vehicle Code which makes the temporary or permanent taking of an automobile a felony and amend Section 499b of the Penal Code to provide that (1) the temporary taking or driving of a motor vehicle without the owner's consent is a misdemeanor and (2) the permanent taking or driving of a motor vehicle without the owner's consent is a felony. There should also be added to Section 499b the provision now found in Section 503 of the Vehicle Code that the consent of an owner to its taking shall not be inferred from the fact that he consented to past takings by the defendant or another. These changes in the law relating to the unlawful taking of motor vehicles would eliminate the unnecessary and somewhat confusing duplication which now exists in the statutes relating to the various offenses involved. While the proposed changes almost entirely preserve existing law, it should be noted that Vehicle Code Section 503 presently authorizes the charging of a felony in the case of the temporary taking or driving of a motor vehicle without the owner's consent, whereas Penal Code Section 499b as proposed to be revised would make such a taking a misdemeanor in all cases.

Driving While Intoxicated

Repeal Sections 367d and 367e of the Penal Code and amend Section 502 of the Vehicle Code to make it applicable to driving while under the influence of intoxicating liquor whether or not the driving occurs upon a highway. These changes will preserve in Sections 501 and 502 of the Vehicle Code the substance of the present law relating to driving while intoxicated while eliminating two Penal Code provisions which are unnecessary and whose continued existence can only be a source of confusion. Moreover, it will assure that the provisions of the Vehicle

Code which make jail sentences mandatory for second drunk driving offenders and which require that judgments of conviction of all drunk driving offenders be sent to the Department of Motor Vehicles with consequent revocation of their drivers' licenses will be applicable to all persons who commit such offenses.

The Commission's recommendation would be effectuated by enacting the following measures: *

An act to repeal Section 503 of the Vehicle Code and to amend Sections 487 and 499b of the Penal Code, all relating to taking a vehicle without the consent of the owner.

The people of the State of California do enact as follows:

SECTION 1. Section 503 of the Vehicle Code is hereby repealed.

SEC. 2. Section 487 of the Penal Code is amended to read:

487. Grand theft is theft committed in any of the following cases:

1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ~~($200)~~ ; provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ~~($50)~~ ; provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ~~($200)~~ or more in any 12 consecutive month period, then the same shall constitute grand theft.

2. When the property is taken from the person of another.

3. When the property taken is ~~an automobile,~~ *a* horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow or pig.

SEC. 3. Section 499b of the Penal Code is amended to read:

499b. Any person who ~~shall~~, without the permission of the owner thereof, take*s or drives* any automobile, bicycle, motorcycle or other vehicle ~~for the purpose of temporarily using or operating the same, shall be deemed~~ *is* guilty of a misdemeanor ~~,~~ *if the act is done with the intent to temporarily deprive the owner of possession of such vehicle and is guilty of a felony if the act is done with the intent to permanently deprive the owner of title to or possession of such vehicle.* ~~and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars ($200), or by imprisonment not exceeding three months, or by both such fine and imprisonment.~~

A person convicted of a felony hereunder shall be subject to the same punishment as that provided in Section 489 of this code.

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted from the present law.

The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same person or a different person.

An act to repeal Sections 367d and 367e of the Penal Code and to amend Section 502 of the Vehicle Code, all relating to driving a vehicle while under the influence of intoxicating liquor.

The people of the State of California do enact as follows:

SECTION 1. Sections 367d and 367e of the Penal Code are hereby repealed.

SEC. 2. Section 502 of the Vehicle Code is amended to read:

502. When Person Driving Under Influence of Liquor Guilty of Misdemeanor. (a) It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle ~~upon any highway~~. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ~~($250)~~ nor more than five hundred dollars ~~($500)~~ or by both such fine and imprisonment and upon a second or any subsequent conviction by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ~~($250)~~ nor more than one thousand dollars ~~($1,000)~~. A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 501 of this code.

(b) Whenever any person is convicted of a violation of this section it is the duty of the judge unless, under the provisions of Section 307, the court recommends that there be no license suspension, to require the surrender to him of any operator's or chauffeur's license of such person and to forward the same to the department with the abstract of conviction as provided in Section 744 hereof, and the department shall suspend the driving privilege of any person so convicted as provided in Section 307.

(c) Any person convicted of a second or subsequent offense under this section shall not be granted probation by the court, nor shall the court suspend the execution of the sentence imposed upon such person.

A STUDY OF THE OVERLAPPING PROVISIONS OF THE PENAL CODE AND THE VEHICLE CODE RELATING TO THE UNLAWFUL TAKING OF VEHICLES AND DRIVING WHILE INTOXICATED*

Both the Penal Code and the Vehicle Code contain provisions dealing with the unlawful taking of a motor vehicle and the driving of a motor vehicle while intoxicated. Notwithstanding judicial effort to differentiate them, these provisions continue to overlap each other causing unnecessary confusion and difficulty. The purpose of this study is to determine whether and by what means this situation should be corrected. It should be kept in mind throughout that the later enacted provisions of the Vehicle Code did not repeal the Penal Code provisions under consideration by implication, despite various judicial pronouncements to the contrary.[1] Vehicle Code Section 803(c) provides that the code does not repeal any existing statute or part thereof except as expressly provided in Section 802, which lists none of the Penal Code sections discussed herein.

UNLAWFUL TAKING OF A MOTOR VEHICLE

The Statutes

Three separate code sections deal with the unlawful taking of a motor vehicle.

Penal Code Section 487 provides in relevant part:

> 487. Grand theft is theft committed in any of the following cases:
>
> . . .
>
> 3. When the property taken is an automobile, . . .[2]

Penal Code Section 499b provides:

> Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, . . .[3]

Vehicle Code Section 503 provides:

> Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or

* This study was made at the direction of the Law Revision Commission by Mr. I. Robert Harris.

[1] See, *e.g.*, People v. Gossman, 95 Cal. App.2d 293, 212 P.2d 585 (1949), *appeal dismissed*, 340 U.S. 801 (1950); People v. Orona, 72 Cal. App.2d 478, 164 P.2d 769 (1946); People v. Bailey, 72 Cal. App.2d Supp. 880, 165 P.2d 558 (1946).

[2] Grand theft is punishable by imprisonment for not more than one year in the county jail or for not more than ten years in the State prison. CAL. PEN. CODE § 489.

[3] Violation of Section 499b is punishable by a fine not exceeding $200, or by imprisonment for not more than three months, or by both fine and imprisonment.

possession of such vehicle, whether with or without intent to steal the same . . . is guilty of a felony. . . .[4]

It is evident that Penal Code Sections 487 and 499b are concerned with two very different offenses. The former punishes theft—the unauthorized taking of an automobile with intent to deprive the owner wholly and permanently of his property. The latter prohibits the "joy-ride"—a temporary unauthorized use.[5] Just how the Vehicle Code Section 503 fits into this scheme, however, is not clear. Much of it comes close to duplicating one or the other of the Penal Code provisions, and a study of the cases is necessary to determine the minute theoretical differences which do exist as well as the problems caused by this coexistence.

The Cases

Penal Code Section 487 and Vehicle Code Section 503

That portion of Section 503 which prohibits the unauthorized taking of an automobile with intent *permanently* to deprive its owner of title or possession appears to be a duplication of Section 487 defining grand theft. Because of the similarity of the offenses, it is common practice for the prosecuting attorney to charge a defendant with violations of both sections. This raises the question whether Section 503 is a lesser offense necessarily included in grand theft.[6] This question is frequently presented when a defendant charged with violating both sections is acquitted under Section 503[7] and convicted under Section 487. In this situation defendants have argued that if one is not guilty of a Section 503 violation he cannot be guilty of grand theft since both charges involve the same act and depend on the same evidence for conviction. The courts have uniformly held, however, that the grand theft conviction may stand.[8] They have said that the acquittal on the Section 503 charge is immaterial, the sole question on appeal being whether there is sufficient evidence to uphold the conviction under Section 487 and that if the inconsistency does constitute error it is error favorable to the defendant.[9]

Faced with this question and reaching the same conclusion, the District Court of Appeal in *People* v. *Jeffries*[10] attempted to justify its holding by finding a *difference* between the two sections. It reasoned that under Section 503 a person may be guilty if he takes an automobile although he intends only to deprive the owner temporarily of possession and even though the taking is without the intent to steal it, whereas grand theft requires a felonious taking of another's property with

[4] Violation of Section 503 is punishable by imprisonment for one to five years in the State prison, or for not more than one year in the county jail, or by a fine not exceeding $5,000, or by both fine and imprisonment.

[5] People v. Tellez, 32 Cal. App.2d 217, 89 P.2d 451 (1939).

[6] The doctrine of included offenses is part of the constitutional guarantee against double jeopardy. CAL. CONST. Art. I, § 13. Section 1023 of the Penal Code implements that guarantee by providing that a prior conviction is a bar to a subsequent prosecution for the same offense "or for an offense necessarily included therein." See People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321 (1949).

[7] Or its predecessor, Section 146 of the California Vehicle Act of 1923. Cal. Stat. 1923, c. 266, § 146, p. 564.

[8] People v. Fields, 83 Cal. App.2d 30, 198 P.2d 104 (1948); People v. Jeffries, 47 Cal. App.2d 801, 119 P.2d 190 (1941); People v. Smith, 117 Cal. App. 530, 4 P.2d 268 (1931); People v. Stovall, 94 Cal. App. 635, 271 Pac. 576 (1928).

[9] People v. Smith, *supra* note 8; People v. Stovall, *supra* note 8.

[10] 47 Cal. App.2d 801, 119 P.2d 190 (1941).

intent to deprive him of it permanently. This approach led the court to conclude simply that "both in substance and in form the offenses charged are distinctly different."[11] The court's observation would support the obviously correct rule that one may be *convicted* of a violation of Section 503 without having committed grand theft. But it does not follow from this that a defendant can be *acquitted* of having committed an offense under Section 503 and yet convicted under Section 487.

The relationship between Sections 487 and 503 is important not only where a defendant is convicted under the former and acquitted under the latter, but also where a prosecution under Section 487 is barred. In *People* v. *Cuevas*[12] the defendant was convicted under Section 503 four years after he had stolen an automobile and after the statute of limitation for grand theft had run. In affirming the judgment the court rejected the defendant's contention that since the prosecution for theft was barred it followed that the offense defined by Section 503 was likewise barred. The court held that the offense of unlawfully *driving* an automobile taken with the intent to deprive the owner of it permanently is quite distinct from that of stealing one, supporting its opinion by reference to the use of the disjunctive in Section 503 — "any person who drives *or* takes" (Emphasis added.) —and suggesting that there are ways of stealing an automobile other than by driving it away, for example by towing it or by loading it on a truck. On the further hypothesis that the defendant might have left the automobile in storage from the time he stole it until the limitation period on theft had run, and thereafter driven it, the court reached the conclusion that the immunity from prosecution for theft would not apply also to prosecution for the illegal driving. In the court's words:

> [W]here, within the actual facts of this case, it appears that the crime of larceny of the automobile had been fully completed, the subsequent act by defendant in driving the automobile without the consent of its owner was entirely separate and disconnected from the original theft of it.... Without the consent of the owner of the automobile, each time that defendant so drove it was in violation of the provisions of the statute.[13]

The question whether a violation of Section 503 is an included offense under Section 487 is also presented when a defendant is charged and convicted of violating both sections. Such a conviction was affirmed in *People* v. *Bean*,[14] the court citing the *Jeffries* case as substantial authority contrary to the defendant's position that violation of Section 503 is included in the offense of grand theft. The court remarked that since the defendant's sentences were to run concurrently "even if there was error, defendant is not prejudiced thereby."[15]

[11] *Id.* at 807, 119 P.2d at 194.
[12] 18 Cal. App.2d 151, 63 P.2d 311 (1936).
[13] *Id.* at 153, 63 P.2d at 312; *cf.* People v. Foogert, 85 Cal. App.2d 290, 193 P.2d 14 (1948), where the defendant's conviction for *concealing* a stolen automobile was upheld although the statute of limitations on the theft had run. There was no evidence, however, that the defendant was the one who had stolen the car; so that although the court suggested that perhaps in a proper case a thief might also be guilty of the separate and distinct act of concealment (citing the *Cuevas* case by way of analogy), it found it unnecessary to decide the point.
[14] 88 Cal. App.2d 34, 198 P.2d 379 (1948).
[15] *Id.* at 41, 198 P.2d at 383.

A year later the California Supreme Court in *People* v. *Kehoe*[16] expressly disapproved the *Bean* opinion. The defendant was convicted of grand theft and of violating Section 503, and was sentenced for each offense. Each crime, according to the information, had been committed on or about the same day in Humboldt County where the case was tried. Kehoe's position was that the evidence showed but one criminal act and that conviction on both counts constituted imposition of double punishment prohibited by Penal Code Section 654. The Attorney General, on the other hand, framed the issue in terms of included offenses, arguing that under the *Jeffries, Bean* and *Cuevas* cases Section 503 was not an offense included within the crime of grand theft.

The Supreme Court reversed the Section 503 conviction, but was apparently unwilling to state definitely whether or not the one crime was necessarily included within the other. Instead, the court reasoned that even if a certain crime is not included within another for the purpose of double jeopardy protection, the conviction of both crimes cannot be justified under certain cirmumstances. Thus, Penal Code Section 654 provides:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; . . .

Observing that this section was not concerned with included offenses but rather with the question whether two statutes punish one specific act of a defendant and ignoring the statutory words "*of this code,*" the court invoked Section 654 rather than the doctrine of included offenses to reverse the double conviction.

Speaking of the three sections dealing with the unlawful taking of an automobile, the court said:

> Obviously the three statutes are part of a general legislative plan of protection and punishment conceived to prevent the taking or use of an automobile without the owners' [*sic*] consent. Different punishment is fixed to correspond with the intent with which each offense is committed, but the legislation is directed against one evil. Insofar as they relate to a single act of taking an automobile without the permission of the owner, section 503 of the Vehicle Code and section 487 of the Penal Code may subject the offender to but one punishment.[17]

Although the Supreme Court in the *Kehoe* case avoided a direct answer to the question whether a Section 503 violation is necessarily included within the crime of grand theft, the implication is that previous cases indicating a negative answer are of little force today. In the first place, the court's reliance on Section 654 invites attention to a further provision of that section, although the court itself did not mention it: "[A]n *acquittal* or conviction and sentence under either one bars a prosecution for the same act or omission under any other." (Emphasis added.) Assuming that the court was correct in applying

[16] 33 Cal.2d 711, 204 P.2d 321 (1949).
[17] *Id.* at 714, 204 P.2d at 323. See also People v. Saltz, 131 Cal. App.2d 459, 280 P.2d 900 (1955); People v. McPheeley, 92 Cal. App.2d 589, 207 P.2d 651 (1949) (dictum).

Section 654 to this situation, the language just quoted should cast serious doubt on cases such as *Jeffries*[18] which hold that acquittal under Section 503 does not prevent conviction under Section 487.

Secondly, the court not only expressly disapproved the *Bean* opinion, but also cast doubt on the views expressed in the other cases cited by the Attorney General for the proposition that a Section 503 offense is not included within the crime of grand theft. The court observed that the language in the *Jeffries* case was not necessary to the opinion and that the *Cuevas* decision involved an entirely different question.

Finally, cases subsequent to the *Kehoe* opinion have interpreted it as meaning that Section 503 is included within Section 487. For example, a District Court of Appeal said in 1953:

> The charge, being grand theft committed in the stealing of an automobile, included the offense of violation of section 503 of the Vehicle Code. . . . [T]he conviction of one offense would amount to an acquittal of the other [citing *Kehoe*], . . .[19]

The Supreme Court itself, in the recent case of *People* v. *Marshall*,[20] held that violation of Section 503 is a lesser but necessarily included offense in the crime of robbery[21] of an automobile so that a defendant charged with the latter could be convicted of the former. In its opinion the court discussed the relationship between Sections 503 and 487 and cited the *Kehoe* case as tending to support the view that theft of an automobile includes the lesser Section 503 offense. The court interpreted that case as disapproving the view previously taken by some district courts of appeal that a Section 503 violation is entirely different from the crime of automobile theft, and it reached the conclusion that "the intent to temporarily deprive the owner of the use of a vehicle is an element included in the intent to steal the vehicle."[22]

However, one further aspect of *People* v. *Kehoe* requires discussion. This is its apparent approval of the *Cuevas* distinction between "taking" and "driving." The court stated that because the defendant took the car in Humboldt County and was arrested while driving the car in Monterey County one week later, he might also have been prosecuted in the latter county under Section 503. Furthermore the opinion hinted that both Humboldt County convictions might have stood if the information had not charged that each offense was committed on or about the same day in Humboldt County and if there had been "evidence showing a substantial break between Kehoe's taking and his use of the automobile in that county."[23] A concurring opinion by Justice Carter, on the other hand, disapproved the *Cuevas* case on the ground that the crime of Section 503 is not a continuous offense but is complete once the car has been driven.

In addition to the question of lesser included offenses, a problem of what offense a defendant was convicted of can arise under Sections

[18] See also cases cited in note 8 *supra*.
[19] People v. Crawford, 115 Cal. App.2d 838, 841, 252 P.2d 963, 964 (1953).
[20] 48 Cal.2d 394, 309 P.2d 456 (1957).
[21] CAL. PEN. CODE § 211.
[22] People v. Marshall, 48 Cal.2d 394, 400, 309 P.2d 456, 459 (1957); *cf.* People v. Galuppo, 81 Cal. App.2d 843, 185 P.2d 335 (1947), where defendant's conviction of both robbery of an automobile and violation of Section 503 was sustained against attack on other grounds and without mention of the question of included offenses or double punishment.
[23] People v. Kehoe, 33 Cal.2d 711, 715, 204 P.2d 321, 324 (1949).

487 and 503. In *People* v. *McPheeley* [24] the defendant who was charged with feloniously escaping from prison argued that his original commitment had been void. He had been convicted on an information charging that he

> did wilfully, unlawfully and feloniously drive and take a certain vehicle, . . . without the consent of [the owners] with the intent to deprive the said owners, . . . of their title to and possession of said vehicle. [25]

To the defendant's contention in the second case that the earlier judgment might have been a conviction of any one of three separate offenses (Sections 499b, 503 or 487), the court answered that the information had sufficiently charged grand theft, and that at any rate the defendant's imprisonment was authorized by either Section 487 or Section 503 so that he was not prejudiced by the vagueness of the first conviction. Since the court in the original case did not state under which section the defendant was convicted, the court in the second case had to guess. The choice is vitally important in view of the fact that a conviction under Section 487 may be the basis for a later judgment of habitual criminality under Penal Code Section 644 whereas a conviction under Section 503 may not. [26]

The conclusion which may be drawn from the foregoing analysis is that the law with respect to the relationship between Section 487 and Section 503 is uncertain. The *Kehoe* case indicates that a defendant may be convicted of both offenses if the prosecution charges and proves a "substantial break" between the "taking" and the "driving," but no definition of "substantial break" has yet emerged. But insofar as Section 503 prohibits the unlawful "taking" of an automobile, it is apparently a lesser offense included in grand theft, or at least a defendant may not be convicted under both for the same act. It is also possible although not certain, however, that the courts will continue to hold that a Section 503 acquittal does not preclude a conviction under Section 487. At any rate it is apparent that no purpose whatever is served by the coexistence of the two sections.

Penal Code Section 499b and Vehicle Code Section 503

In situations where the crime of grand theft cannot be made out because of the defendant's lack of an intent to deprive the owner permanently of his property, either Section 503 of the Vehicle Code or Section 499b of the Penal Code may be applicable. Here again, difficulties arise in determining which offense the defendant has committed.

One very obvious difference inheres here, as in the case of Section 487, in the fact that Section 503 punishes either the taking or the driving whereas Section 499b prohibits only the taking of an automobile. [27]

A less obvious distinction, and perhaps not really a distinction at all, lies in the wording of the two sections with respect to the subjec-

[24] 92 Cal. App.2d 589, 207 P.2d 651 (1949).
[25] *Id.* at 591, 207 P.2d at 653.
[26] *In re* Connell, 68 Cal. App.2d 360, 156 P.2d 483 (1945); People v. McChesney, 39 Cal. App.2d 36, 102 P.2d 455 (1940).
[27] People v. Gibson, 63 Cal. App.2d 632, 146 P.2d 971 (1944). Formerly, Section 503 required that the taking be in the absence of the owner, an element not found in Section 499b. This requirement was eliminated, however, by amendment in 1947. Cal. Stat. 1947, c. 813, § 1, p. 1926. See People v. Ball, 204 Cal. 241, 267 Pac. 701 (1928); Comment, 21 So. Calif. L. Rev. 176 (1948).

tive element of intent. Section 503 uses the phrase: "with intent to . . . temporarily deprive the owner thereof of his title to or possession of such vehicle." Section 499b, on the other hand, requires the taking to be "for the purpose of temporarily using or operating the same." Although it is difficult to see how a person can take a car for the purpose of using it without also intending to deprive its owner of possession, the courts have bravely attempted to distinguish the two concepts. A typical statement is found in *People* v. *Neal:*

> Section 503 is distinguished from section 499b of the Penal Code in that *specific intent is not an element in the violation of this latter statute.* Section 499b is the so-called "Joy-ride" statute. There is a violation within the meaning of the provisions of this section when an individual without the permission of the owner takes any aircraft, motor vehicle, bicycle, etc., for the purpose of temporarily using or operating the same. The violation of section 499b is made a misdemeanor. (Emphasis added.)[28]

Although such statements would seem to indicate that no "intent" whatever is required by Section 499b, and that the "purpose" element of that section is something entirely different from "intent,"[29] the opinion in *People* v. *Bailey*[30] indicates that such is not the case—that both sections require intent, but different kinds of intent. The court there interpreted the *Neal* statement "as meaning no more than that the specific intent *made an element of the crime created by section 503* need not be present in the act made an offense by the Penal Code section." (Emphasis added.)[31] The court went on to say:

> A specific intent is essential to constitute the misdemeanor of section 499b, and it serves further to distinguish the two sections. To be a misdemeanor, the taking must be for the purpose, *that is, with the intent, for the words are synonymous* [citing cases and Webster's New International Dictionary, 2d ed.] "of temporarily using or operating the same." (Emphasis added.)[32]

The court then attempted to distinguish between the intent necessary to each offense, but in so doing merely used the words of the statutes.[33] To sharpen the distinction, however, the opinion suggested that the taking of an automobile by a bailee in possession, such as a garage attendant, would not deprive the owner of possession and hence would be for mere temporary use. But this theory ignores the fact that the taking might still be with an *intent* to deprive the owner of possession. Moreover, Section 499b prosecutions have not been confined to cases of unauthorized use by bailees nor have bailees been immune from conviction under Section 503.[34]

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[28] 40 Cal. App.2d 115, 118, 104 P.2d 555, 557 (1940); see also People v. Ray, 162 Adv. Cal. App. 335, 328 P.2d 219 (1958); People v. Orona, 72 Cal. App.2d 478, 164 P.2d 769 (1946); People v. Gibson, 63 Cal. App.2d 632, 146 P.2d 971 (1944); People v. Zervas, 61 Cal. App.2d 381, 142 P.2d 946 (1943).

[29] See, *e.g.*, Case Note, 23 So. CALIF. L. REV. 107 (1949).

[30] 72 Cal. App.2d Supp. 880, 165 P.2d 558 (1946).

[31] *Id.* at 883, 165 P.2d at 559-60.

[32] *Ibid.*

[33] See also People v. Ball, 204 Cal. 241, 267 Pac. 701 (1928).

[34] In People v. Greene, 80 Cal. App.2d 745, 182 P.2d 576 (1947), and People v. Slayden, 73 Cal. App.2d 345, 166 P.2d 304 (1946), bailees were convicted of violating Section 503. A possible distinction, however, is that the defendants in those cases retained the automobiles beyond the times when they should have returned them to their owners, whereas the *Bailey* theory seems to assume a timely return.

Whether or not there is a real distinction between the "intent" required by Section 503 and the "purpose" which is an element of Section 499b, they have been construed to require different kinds of proof. Although the courts have said that the question of intent under Section 503 is one solely for the jury, whose verdict will not normally be disturbed on appeal,[35] they have also insisted that the existence of such intent—*i.e.*, temporarily to deprive the owner of his title to or possession of such vehicle—is a fact which must be proved by substantial evidence like any other fact. The burden of proving this intent is not satisfied merely by evidence of an unauthorized taking or use and a subsequent abandonment whereas such evidence is sufficient to prove a violation of Section 499b.[36] Mere retention of an automobile entrusted to the defendant beyond the time required to perform a designated mission has been held insufficient as a matter of law to show the intent required by Section 503.[37] And merely riding as a passenger in a stolen car, even if unexplained, cannot justify a finding of felonious intent.[38]

The elusive if not phantom distinction between the elements of subjective intent required by the two sections has also caused a problem of pleading. In *People* v. *Bailey*,[39] for example, the court took the view that in charging a violation of Section 499b it is insufficient merely to allege an intent to use temporarily in the language of the statute. In addition thereto the pleader must expressly negate the greater Section 503 offense by alleging a lack of the intent specified in that section. The opinion declared:

> In charging the less frequently committed and minor crime, . . . it should be made clear that it was a misdemeanor and not a felony that had been committed. This may be done by charging that there was a taking, without the owner's consent, . . . with the purpose of temporarily using or operating the same but not with intent to deprive the owner of his title to or possession of the automobile. . . . [T]he complaint in this case is, for the reasons stated, defective, . . .[40]

The conclusion to be drawn from the foregoing seems to be that the difference between Section 503 and Section 499b (aside from the "taking-driving" distinction) lies in the kinds of proof required. But this is the end result of an assumption that there is a real difference between intending to use for one's own purposes and intending to deprive the owner of possession; the rationale behind that assumption has never been, nor can it be, adequately explained. The bailee theory is of questionable soundness, and at any rate such a situation would be very rare. Consequently, for all practical purposes the two sections are identical, resulting in needless duplication, difficulties in pleading and the existence of an extremely tenuous basis for distinguishing between a felony (Section 503) and a misdemeanor (Section 499b). Further-

[35] See, *e.g.*, People v. Ragone, 84 Cal. App.2d 476, 191 P.2d 126 (1948).
[36] People v. Neal, 40 Cal. App.2d 115, 104 P.2d 555 (1940). *But see* People v. Score, 48 Cal. App.2d 495, 120 P.2d 62 (1941), where the defendant's mere occupancy of the owner's parked car at the time of the latter's return was held sufficient to sustain a Section 503 conviction.
[37] People v. Gibson, 63 Cal. App.2d 632, 146 P.2d 971 (1944).
[38] People v. Zervas, 61 Cal. App.2d 381, 142 P.2d 946 (1943).
[39] 72 Cal. App.2d Supp. 880, 165 P.2d 558 (1946).
[40] *Id.* at 884, 165 P.2d at 560.

more it should be noted that a court is able to change a Section 503 conviction into a misdemeanor — in effect, the equivalent of a Section 499b conviction — for all purposes, simply by imposing punishment other than imprisonment in the State prison.[41]

DRIVING OF A MOTOR VEHICLE WHILE INTOXICATED

The Statutes

Four code sections deal with the driving of a motor vehicle while intoxicated. Of these, two make drunk driving in and of itself a misdemeanor. Thus, Penal Code Section 367d provides:

> 367d. Any person operating or driving an automobile, motor cycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motor cycle or other motor vehicle shall be guilty of a misdemeanor.[42]

Vehicle Code Section 502 provides:

> 502. . . . (a) It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway.[43]

Two other sections make it a felony to cause bodily injury while driving under the influence of liquor.

Penal Code Section 367e provides:

> 367e. Any person operating or driving an automobile, motor cycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motor cycle or other motor vehicle, and who by reason of such intoxication does any act, or neglects any duty imposed by law, which act or neglect of duty causes the death of, or bodily injury to, any person, shall be punishable by imprisonment in the state's prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $500 or by both such fine and imprisonment.

Vehicle Code Section 501 provides:

> 501. . . . Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony. . . .[44]

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[41] CAL. PEN. CODE § 17; People v. Trimble, 18 Cal. App.2d 350, 63 P.2d 1173 (1936); accord, People v. Wilson, 59 Cal. App.2d 610, 139 P.2d 673 (1943); People v. Rowland, 19 Cal. App.2d 540, 65 P.2d 1333 (1937).

[42] Violation of Section 367d is punishable by imprisonment for not more than six months in the county jail, or by a fine not exceeding $500, or by both fine and imprisonment. CAL. PEN. CODE § 19.

[43] Violation of Section 502 is punishable by driver's license suspension, and upon a first conviction by imprisonment for 30 days to six months in the county jail or by a fine of $250 to $500 or by both fine and imprisonment, and upon a second or any subsequent conviction by imprisonment for 5 days to one year in the county jail and by a fine of $250 to $1,000. A person convicted of a second or subsequent violation is not eligible for probation nor may the execution of his sentence be suspended.

[44] Violation of Section 501 is punishable by imprisonment for one to five years in the State prison or for 90 days to one year in the county jail and by fine of $250 to $5,000.

Because Vehicle Code Sections 502 and 501 overlap and in many respects duplicate the earlier Penal Code Sections 367d and 367e, the courts have assumed that the former have repealed the latter by implication, and the scarcity of cases even mentioning this coexistence indicates that the courts are less troubled here than in the area of automobile theft. Nevertheless an examination of the relationship and differences between the Vehicle Code and Penal Code sections is made necessary by the fact that the latter sections remain in the code and may well retain their vitality (in spite of judicial indication to the contrary), by virtue of the non-repeal provisions of Vehicle Code Sections 803(c) and 802.[45]

The Cases

Penal Code Section 367d and Vehicle Code Section 502

The predecessor of Section 502 was Section 112 of the California Vehicle Act of 1923[46] which made driving while intoxicated a felony — not in so many words, but by virtue of the fact that imprisonment in the State prison was a possible penalty.[47] When Section 502 was adopted in 1935[48] the offense was downgraded to a misdemeanor. At the same time Section 501,[49] making it a felony to injure someone while driving under the influence of liquor, was enacted.

While Section 112 was in force and until a year before it was superseded by Section 502, the question whether its enactment in 1923 repealed Penal Code Section 367d pro tanto by implication was never really considered by any of the higher courts in California. In a few cases reference was made to the Penal Code section and to one or more of the Vehicle Act provisions, but no opinion was expressed regarding their effect on each other.[50] One case[51] upheld a commitment under Section 367d but the failure of the opinion to make any reference to Section 112 indicates that the question was neither raised nor considered.

Then, in 1934 the Appellate Department of the Superior Court in *People* v. *Lewis*[52] reversed a conviction under Section 367d on the ground that the Penal Code provision was no longer in force insofar as it was duplicated by Section 112 of the Vehicle Act. The only difference between the two statutes, felt the court, was that Section 112 was limited to offenses committed while driving on highways whereas Section 367d was not. Although the complaint in the case did not specify the location of the offense the evidence showed that it occurred on a public highway. It was clear to the court that:

> [S]ection 367d of the Penal Code can no longer be regarded as in force except in regard to offenses not covered by the vehicle acts,

[45] See p. E-8 *supra*.
[46] Cal. Stat. 1923, c. 266, § 112, p. 553.
[47] See People v. Collins, 195 Cal. 325, 233 Pac. 97 (1925), which declared that driving while intoxicated was a felony unless non-felonious punishment was imposed.
[48] Cal. Stat. 1935, c. 764, p. 2141.
[49] *Ibid.*
[50] See People v. Collins, 195 Cal. 325, 233 Pac. 97 (1925); People v. Aguilar, 140 Cal. App. 87, 35 P.2d 137 (1934); People v. Lloyd, 97 Cal. App. 664, 275 Pac. 1010 (1929).
[51] *In re* Branham, 116 Cal. App. 59, 2 P.2d 41 (1931).
[52] 4 Cal. App.2d Supp. 775, 37 P.2d 752 (1934).

such as the driving of a motor vehicle on private ground by one who is intoxicated.[53]

Whether the restriction of Vehicle Code Section 502 to offenses committed on highways would actually preclude a Section 502 prosecution in the rare case of drunk driving on private property has never been decided, but it is clear from the *Lewis* case that in the more usual situation of an offense committed while driving on a highway a prosecution under the more inclusive Penal Code provision is improper. At least the prosecutors appear to have thought so, for there seems to have been no case since *Lewis* in which a defendant was charged under Section 367d.

Also discussed by the court in the *Lewis* opinion was the fact that Section 367d prohibits driving while "intoxicated" whereas Section 112 (and subsequently Section 502) uses the term "under the influence of intoxicating liquor." Although the court denied that this was any distinction at all between these statutory terms, the California Supreme Court in *People* v. *Haeussler*[54] expressly disapproved this statement. In this case the trial judge, defining the phrase "under the influence of intoxicating liquor" in a case brought under Section 502, charged the jury that it was not necessary to find that the defendant was "drunk" or "intoxicated," but that it would be sufficient if they found that intoxicating liquor had "so far affected the nervous system, brain or muscles as to impair to an appreciable degree the ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions."[55] The defendant objected to the instruction, citing the *Lewis* and other cases for the proposition that the phrase "under the influence of intoxicating liquor" is synonymous with the word "intoxicated." Upholding the instruction and referring to those cases, the Supreme Court stated:

> Insofar as these decisions hold that a person who is intoxicated also is under the influence of intoxicating liquor they are correct. [Citation omitted.] It is generally recognized, however, that persons may be "under the influence of intoxicating liquor" . . . without being affected to the extent commonly associated with "intoxication" or "drunkenness." [Citations omitted.] To the extent that they indicate a contrary holding, *Taylor* v. *Joyce* and *People* v. *Lewis* . . . are disapproved.[56]

It may be concluded then, that two differences exist between Section 367d and Section 502—aside from the punishments imposed,[57] which of course have no bearing on applicability. The first lies in the limitation of Section 502 to offenses committed on highways. No reason appears to justify the maintenance of two separate code provisions defining the offense of drunk driving, the application of each depending

[53] *Id.* at 778, 37 P.2d at 753; see also People v. Gossman, 95 Cal. App.2d 293, 213 P.2d 585 (1949), *appeal dismissed*, 340 U.S. 801 (1950), the only case which discusses the relationship between Section 367d and the present Vehicle Code Section 502, and which, without mentioning the language of Vehicle Code Section 803(c), reaffirms the *Lewis* position.

[54] 41 Cal.2d 252, 260 P.2d 8 (1953); *cert. denied*, 347 U.S. 931 (1954).

[55] *Id.* at 261, 260 P.2d at 13.

[56] People v. Haeussler, 41 Cal.2d 252, 262, 260 P.2d 8, 14 (1953), *cert. denied*, 347 U.S. 931 (1954).

[57] See notes 42 and 43 *supra*.

on the location of the forbidden act. The second is that a lesser degree of intoxication is apparently required by Section 502. In this respect Section 367d is quite unnecessary since Section 502 applies to every situation to which Section 367d would be applicable.

It would appear to be desirable to repeal Penal Code Section 367d and to revise Vehicle Code Section 502 by deleting the words "upon any highway" therefrom. These legislative changes would make no substantive change in the law relating to the offense of drunk driving while eliminating the present unnecessary and somewhat confusing duplication of statutory provisions on this subject. Moreover, it would have two substantial collateral advantages:

(1) By conforming Section 502 to Section 501 through the elimination of "upon the highway" it would eliminate the awkward situation now prevailing with regard to "included offenses." *People* v. *Gossman*[58] had indicated that a person charged with violation of Section 501 could be found guilty as an "included offense" of a violation of Section 502 of the Vehicle Code. However, the *Gossman* case was disapproved in *People* v. *Marshall.*[59] The new test of "included offense" is whether the lesser offense must necessarily have been committed if the offense described in the language of the accusatory pleading was committed. Since the ordinary information or indictment charging a violation of Section 501 will not specify that the driving was done on a public highway, the crime of violation of Section 502 is not an included offense. If Section 502 were amended as suggested above, it would be.

(2) The continued existence of Section 367d permits evasion of legislative intent as manifested in the Vehicle Code in two particulars. Section 502 provides for mandatory jail terms for second offenders. Such sentences can be avoided in particular cases by charging a violation of Section 367d rather than Section 502. Similarly, abstracts of judgments of conviction for Vehicle Code violations are sent by the courts to the Department of Motor Vehicles[60] and on the basis of these abstracts the Department suspends the driver's license of a person convicted of driving while under the influence of intoxicating liquor.[61] Abstracts of judgments are not received by the Department of Motor Vehicles for Penal Code violations and consequently a person convicted under Section 367d does not lose his driver's license even though he has been convicted many times previously. Here again it is possible to avoid a penalty for drunken driving prescribed by the Legislature by charging a violation of Section 367d rather than of Section 502.

Penal Code Section 367e and Vehicle Code Section 501

In instances where the misdemeanor of drunk driving is aggravated by killing or injuring some person, the more serious offense defined by Sections 367e and 501 is made out. Because of the essential similarity of these sections no case has been found in which a violation of Section 367e was charged subsequent to the adoption of Section 501. Nevertheless, certain differences between them do exist and, as previously indicated, Section 367e must still be regarded as in force al-

[58] 95 Cal. App.2d 293, 212 P.2d 585 (1949).
[59] 48 Cal.2d 394, 405, 309 P.2d 456, 462 (1957).
[60] CAL. VEH. CODE § 744.
[61] *Id.* § 307.

though it has apparently been forgotten by the prosecutors and the courts.

One difference between Section 367e and Section 501 is that the latter requires that the act which causes the injury be "an act forbidden by law" whereas the former does not. Thus, to obtain a conviction under Section 501 the commission of two "forbidden acts" must be proved: (1) driving while intoxicated, forbidden by Section 502 and (2) another act forbidden by law—e.g., speeding. It is clear that the mere fact that the defendant injured someone while driving in an intoxicated condition is not sufficient for a conviction under Section 501.[62] This aspect of Section 501 has been criticized:

> Why should there be required still another "forbidden" act apart from the act of driving while under the influence of liquor, which is unlawful in itself? It might be considered reasonable to eliminate the requirement of a causal connection between intoxication and injury, but there was no necessity to accompany this change with the requirement of an additional "forbidden" act.[63]

A second difference between Section 367e and Section 501 is that the former requires that the act or neglect which causes the injury occur "by reason of such intoxication" whereas the latter specifies only that the act or neglect take place "when so driving." In other words, Section 367e expressly demands a causal connection between the intoxication and the injury whereas Section 501 does not. This difference is offset, however, by the fact that the courts have held that there must be a causal relationship between the "act forbidden by law" required by Section 502 and the injury. This has resulted in acquittals of defendants who probably would not have escaped under Section 367e. For example, in the case of *In re Ryan*,[64] the court on a writ of habeas corpus set free the petitioner, who while intoxicated (or so the court assumed) had driven his car 55 miles an hour, swerved to the left, and then drove over the right embankment on an open and comparatively straight road fatally injuring his passenger. The court held that the State was required to prove not only that petitioner had driven while intoxicated and had committed a "forbidden act," but that *that act* had been the proximate cause of the injury. Thus, the court said:

> In the absence of a showing herein, either that the circumstances required a slower speed than the evidence disclosed or that the one failure to comply with the terms of Section 525 of the Vehicle Code (driving on right side of highway) proximately caused the fatal injury to [petitioner's passenger], it cannot be said that petitioner's driving was such as to bring his actions within the prohibitions of Section 501 of the Vehicle Code.[65]

[62] Whitlock v. Superior Court, 97 Cal. App.2d 26, 217 P.2d 158 (1950); People v. Levens, 28 Cal. App.2d 455, 82 P.2d 698 (1938).
[63] Comment, 24 CALIF. L. REV. 555, 559 (1936).
[64] 61 Cal. App.2d 310, 142 P.2d 769 (1943).
[65] *Id.* at 313, 142 P.2d at 771; *cf.* People v. Trantham, 24 Cal. App.2d 177, 74 P.2d 851 (1937), where defendant's driving on the left-hand side of the road just before the accident was held to constitute the additional forbidden act, but there an oncoming vehicle was involved in the accident.

A third difference between Section 367e and Section 501 is that while the former includes the causing of death the latter refers only to bodily injury. This difference is more apparent than real, however, since it seems clear that a defendant could be prosecuted under Section 502 in a death case since bodily injury is necessarily involved in every such case. Moreover, if the prosecutor chooses to invoke a law specifically mentioning homicide, he may charge a violation of Section 192(3) of the Penal Code which provides that the unlawful killing of a human being without malice constitutes the crime of manslaughter if the killing occurs in the driving of a vehicle, with or without gross negligence, "in the commission of an unlawful act, not amounting to a felony . . . or in the commission of a lawful act which might produce death . . . in an unlawful manner" provided that the death is the proximate result of the commission of the act.

Although Section 367e of the Penal Code has been in the law for nearly 50 years, there is not a single reported case showing that anyone has been prosecuted for this violation. There have been, of course, countless prosecutions for violation of Section 501 of the Vehicle Code and for Section 192(3) of the Penal Code. It seems clear that Section 367e should be repealed as being wholly unnecessary and potentially a source of confusion. Such repeal would also have the collateral advantage of making it impossible for a prosecutor, by charging a violation of Section 367e rather than of Section 501, to relieve the defendant of the more stringent provisions relating to suspension of drivers' licenses which are applicable to persons convicted under Section 501.[66]

[66] See CAL. VEH. CODE § 307.

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